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SECRETARIAT

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FEDERAL ELECTION COMMISSION  
999 E Street, N.W.  
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

**SENSITIVE**

MUR: 5600  
DATE COMPLAINT FILED: November 2, 2004  
DATE OF NOTIFICATION: November 9, 2004  
LAST RESPONSE RECEIVED: January 3, 2005  
DATE ACTIVATED: October 13, 2005

EXPIRATION OF STATUTE OF LIMITATIONS:  
July 2, 2009

COMPLAINANT:

Greg McNeilly

RESPONDENTS:

Michigan Democratic State Central Committee and  
Alan Helmkamp, in his official capacity as treasurer  
John D. Dingell for Congress Committee and Guy  
R. Martin, in his official capacity as treasurer  
Representative John D. Dingell

RELEVANT STATUTES AND  
REGULATIONS:

- 2 U.S.C. § 431(20)
- 2 U.S.C. § 431(22)
- 2 U.S.C. § 431(23)
- 2 U.S.C. § 434
- 2 U.S.C. § 441a(a)(7)(B)(i)
- 2 U.S.C. § 441d
- 2 U.S.C. § 441i(b)
- 11 C.F.R. § 104
- 11 C.F.R. § 109.21
- 11 C.F.R. § 110.11
- 11 C.F.R. § 300

INTERNAL REPORTS CHECKED:

Federal Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

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1 **I. INTRODUCTION**

2 The complainant in this matter alleges that the Michigan Democratic State Central  
3 Committee and Alan Helmkamp, in his official capacity as treasurer ("MDSCC"), the John D.  
4 Dingell for Congress Committee and Guy R. Martin, in his official capacity as treasurer (the  
5 "Dingell Committee"), and Representative John D. Dingell may have violated the Federal  
6 Election Campaign Act of 1971, as amended (the "Act") by coordinating a public communication  
7 in the form of a mass mailing ("mailer") in which a photograph of and a quotation attributed to  
8 Representative Dingell appear. The mailer was produced and distributed by the MDSCC in  
9 support of Kathy Angerer, a candidate for state office.<sup>1</sup>

10 As discussed below, the mailer does not meet the definition of either Federal election  
11 activity or coordinated communication, and therefore violations premised on those definitions  
12 did not occur. However, there is a basis for the complaint's allegation that the MDSCC violated  
13 the Act by not placing its disclaimer in a printed box set apart from the rest of the content of the  
14 mailer.<sup>2</sup> We therefore recommend that the Commission find reason to believe that the MDSCC  
15 violated the disclaimer provisions of the Act by failing to place its disclaimer in a printed box,

16 We further recommend that the Commission  
17 find no reason to believe that the MDSCC made improper expenditures for the mailer using non-  
18 federal funds or failed to properly report disbursements for a public communication related to the  
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<sup>1</sup> The MDSCC is a State committee as defined under 11 C.F.R. § 100.14(a), and is a registered political committee with the Commission. See 2 U.S.C. § 431(4).

<sup>2</sup> The complaint's allegations about the Dingell Committee and Dingell are not detailed. However, we assume that the complaint is implying that if the MDSCC made improper contributions to them, that they violated the Act by accepting them.

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1 mailer. Finally, we recommend that the Commission find no reason to believe that the Dingell  
2 Committee or Dingell violated the Act with respect to the mailer.

3 **II. FACTS**

4 The multi-paged mailer, provided with the complaint, promotes the campaign of Angerer,  
5 a candidate for the Michigan House of Representatives' 55<sup>th</sup> District.<sup>3</sup> A purported quotation  
6 from Dingell, who at the time was a Democratic candidate for re-election in the 15<sup>th</sup>  
7 Congressional District in Michigan, appears in the mailer. The quotation reads, “Kathy Angerer  
8 has a plan for affordable health care and prescription drugs. She knows that we need to stand by  
9 our seniors and veterans.’ – Congressman John Dingell.” Beneath the quotation, there is a  
10 photograph of Dingell and Angerer together. In the return address position, the mailer includes  
11 the disclaimer, “Paid for by Michigan Democratic State Central Committee, 606 Townsend,  
12 Lansing, MI 48933 [and two spaces down] *Not authorized by any candidate committee.*”  
13 (Emphasis in original). The disclaimer is not contained in a printed box. The MDSCC paid for  
14 the mailer from its non-federal account.

15 **III. ANALYSIS**

16 **A. The MDSCC did not make improper expenditures for a public**  
17 **communication or violate the reporting requirements of the Act**

18  
19 **1. The mailer is not a Federal election activity**

20 The complainant alleges that the undated mailer was “publicly distributed or disseminated  
21 120 days or fewer before the November 2, 2004 general election in the 15<sup>th</sup> Congressional  
22 District,” and was therefore a “Federal election activity” as defined at 2 U.S.C. § 431(20). If the

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<sup>3</sup> Maps of Dingell's Congressional district and Angerer's state district show considerable overlap.

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1 mailer constituted Federal election activity, the MDSCC would be required to pay for it with  
2 funds subject to the Act's limitations and prohibitions. See 2 U.S.C. § 441i(b)(1).

3 The Act defines "Federal election activity," in pertinent part, as:

4 [A] public communication that refers to a clearly identified candidate for Federal  
5 office (regardless of whether a candidate for State or local office is also mentioned  
6 or identified) and that promotes or supports a candidate for that office, or attacks  
7 or opposes a candidate for that office (regardless of whether the communication  
8 expressly advocates a vote for or against a candidate); ...

9  
10 2 U.S.C. § 431(20)(A)(iii). The term "public communication" includes mass mailings, which in  
11 turn are defined as mailings "by United States mail ... of more than 500 pieces of mail matter of  
12 an identical or substantially similar nature within any 30-day period." 2 U.S.C. §§ 431(22), (23).

13 As the MDSCC response concedes, "[t]he [mailer] is a 'public communication,' because it is a  
14 mass mailing" that clearly refers to Dingell. 2 U.S.C. §§ 431(22), (23); *see also* 11 C.F.R.  
15 §§ 100.26, 100.27. However, the mailer does not "promote or support" Dingell.

16 In Advisory Opinion 2003-25 (Weinzapfel), a local candidate financed a 30-second  
17 television advertisement for his election. In the advertisement, a Federal candidate running for  
18 re-election narrated and endorsed the local candidate. In response to a request asking if that  
19 advertisement promoted or supported a candidate for Federal office, and thus constituted a  
20 Federal election activity, the Commission concluded it did not. According to the Commission,  
21 "[u]nder the plain language of FECA, the mere identification of an individual who is a Federal  
22 candidate does not automatically promote, support, attack, or oppose that candidate." AO 2003-  
23 25. Rather, the legislative history of the Act states that "Congress, in passing BCRA, specifically  
24 contemplated communications paid for by a State or local candidate and referring to a Federal  
25 candidate's endorsement of a State or local candidate," and did not intend for the Act to "prohibit  
26 'spending non-Federal money to run advertisements that mention that [state candidates] have

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1 been endorsed by a Federal candidate or say that they identify with a position of a named Federal  
2 candidate, so long as those advertisements do not support, attack, promote or oppose the Federal  
3 candidate.” *Id.* (quoting Sen. Feingold, 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2004)).

4 The quotation in the mailer attributed to Dingell does not promote or support his  
5 candidacy, but rather endorses the candidacy of Angerer. Likewise, the photograph of Angerer  
6 and Dingell standing together does not, on its face, support or promote Dingell's candidacy.  
7 Nothing else in the mailer promotes or supports Dingell, or attacks or opposes his opponents.  
8 Therefore, the mailer does not constitute a Federal election activity.

9 **2. The mailer is not a coordinated communication**

10 Complainant also alleges that the mailer is an in-kind contribution to Congressman  
11 Dingell and the Dingell Committee in the form of a coordinated communication that had to be  
12 paid for with funds subject to the limitations and prohibitions requirements of the Act and  
13 disclosed in reports the MDSCC filed with the Commission. Respondents, however, provided  
14 affidavits specifically rebutting any factual basis on which to conclude the MDSCC's or the  
15 Dingell Committee's conduct constituted coordination under the Act and regulations.

16 In order to be a coordinated communication, the mailer would have to satisfy a three-  
17 pronged test. *See* 11 C.F.R. § 109.21; *see also* A0 2004-1 (Forgy Kerr). First, the mailer must  
18 have been paid for by a person other than the Federal candidate. 11 C.F.R. § 109.21(a)(1). Since  
19 the mailer was paid for by the MDSCC, the payment prong is satisfied. Second, the mailer must  
20 meet one of four content standards. 11 C.F.R. § 109.21(c). The mailer clearly refers to Dingell,  
21 and complainant posits that the content standard is met because it was publicly distributed or  
22 disseminated to voters in Dingell's district 120 or fewer days before an election. *See* 11 C.F.R.

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1 ~~§ 109.21(c)(4)(i)-(iii); see also note 3, supra.~~ In its response to the complaint, the MDSCC says  
2 nothing about the distribution or dissemination of the mailer.

3 The third prong of the test requires the mailer to meet one of five conduct standards set  
4 forth in 11 C.F.R. § 109.21(d), one of which is material involvement with the communication by  
5 the Federal candidate or his or her authorized committee. 11 C.F.R. § 109.21(d)(2). The  
6 complainant alleges that Dingell and the Dingell Committee were materially involved due to the  
7 appearance of Dingell's photograph and the quotation in the mailer,<sup>4</sup> relying on Advisory  
8 Opinion 2004-1. In that opinion, the Commission stated that "it is highly implausible that a  
9 Federal candidate would appear in a communication without being materially involved" because  
10 the agents of the Federal candidate endorsing the non-federal candidate were materially involved  
11 by reviewing the script and approving the communication.

12 Both the MDSCC and Dingell, as well as Mark Fisk, who "supervised the production and  
13 distribution" of the mailer for the MDSCC, and Michael T. Robbins II, campaign manager for  
14 John Dingell, deny any involvement, much less any material involvement, by Dingell or the  
15 Dingell Committee. Fisk Aff. ¶¶ 5-9; Robbins Aff. ¶¶ 5-10.<sup>5</sup> Fisk states that he and Mark  
16 Brewer, chairman of the MDSCC, conceptualized the "idea" for the mailer, and then produced  
17 and distributed it "with absolutely no involvement by [Dingell] or [the Dingell Committee], or

<sup>4</sup> The complaint does not mention other means through which the conduct standard for a coordinated communication could be met, but the MDSCC and Dingell responses address other possibilities. Both responses indicate that the mailer was not created, produced or distributed at the request or suggestion of Dingell, the Dingell Committee, or their agents. See also Fisk Aff. ¶ 6; Robbins Aff. ¶ 7. Robbins's and Fisk's affidavits both indicate that neither Dingell nor the Dingell Committee had any knowledge of the mailer until the complaint was filed, and there were no substantial discussions regarding the mailer. Robbins Aff. ¶¶ 5-6; Fisk Aff. ¶¶ 5-9. The responses further assert that the mailer was not created, produced or distributed through a common vendor and there is no indication that a former employee or independent contractor was involved with the mailer. See 11 C.F.R. § 109.21(d).

<sup>5</sup> The Dingell Committee itself did not submit a separate response.

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1 any of their agents.” Fisk Aff. ¶ 5. Likewise, Robbins states that he would have been aware of  
2 “any involvement or participation by [Dingell] or [the Dingell Committee]” should it have  
3 occurred, and neither Dingell nor the Dingell Committee or their agents “had any involvement in  
4 any decisions by the MDSCC concerning the [mailer].” Robbins Aff. ¶¶ 6, 8.

5 Moreover, it appears that the quotation attributed to Dingell in the mailer may not have  
6 been something actually uttered by him. According to the MDSCC, the mailer “simply  
7 incorporated the kind of public statement Congressman Dingell had made in the past.”  
8 Specifically, Fisk’s affidavit states, “The quotation in the [mailer] attributed to John Dingell was  
9 developed by agents of the MDSCC, without any input from John Dingell or [the Dingell  
10 Committee]” from information garnered from Dingell’s website. Fisk Aff. ¶ 8. With respect to  
11 the photograph of Dingell and Angerer, Fisk asserts that the MDSCC owns it, and it was not  
12 provided by Dingell or the Dingell Committee. *Id.* at ¶ 9. Therefore, the mailer does not appear  
13 to be a coordinated communication and, thus, does not constitute an in-kind contribution as  
14 alleged.<sup>6</sup>

15 Because the mailer does not constitute either Federal election activity or a coordinated  
16 communication, MDSCC’s disbursements for it need not have come from funds subject to the  
17 limitations, prohibitions, and reporting requirements of the Act. *See* 11 C.F.R. § 300.32(d).  
18 Thus, we recommend the Commission find no reason to believe that the MDSCC violated  
19 2 U.S.C. §§ 434(b)(4) or 441i(b)(1).

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<sup>6</sup> Since the mailer does not satisfy the test for a coordinated communication, it also does not satisfy the standard for a party coordinated communication governed by 11 C.F.R. §§ 109.30-37, because the analysis for both is substantially similar. *See* 11 C.F.R. §§ 109.21; 109.37. In particular, the analysis of the conduct standard at issue in this case is the same for both types of communications. *See* 11 C.F.R. §§ 109.21(d), 109.37(a)(3). Any further analysis concerning party coordinated communications would therefore be redundant.

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1 **B. The disclaimer on the mailer is not adequate**

2 The Act requires that “[w]henver a political committee makes a disbursement for the  
3 purpose of financing any communication through any . . . mailing,” a disclaimer must be present  
4 on that communication.<sup>7</sup> 2 U.S.C. § 441d(a); *see* 11 C.F.R. § 110.11. As the MDSCC is a  
5 political committee and concedes that the mailer is a public communication, *see* 11 C.F.R.  
6 § 110.11(a), the disclaimer requirements apply to the mailer. The Act requires, *inter alia*, that  
7 the disclaimer “be contained in a printed box set apart from the other contents of the  
8 communication.” 2 U.S.C. § 441d(c)(2); *see* 11 C.F.R. § 110.11(c)(2)(ii). The MDSCC’s  
9 disclaimer did not meet this requirement.

10 Based on the above, this Office recommends the Commission find reason to believe that  
11 the Michigan Democratic State Central Committee and Alan Helmkamp, in his official capacity  
12 as treasurer, violated 2 U.S.C. § 441d(e)(2). We further recommend that the Commission find no  
13 reason to believe that the Michigan Democratic State Central Committee and Alan Helmkamp, in  
14 his official capacity as treasurer, made improper expenditures for a public communication using  
15 non-Federal funds in violation of 2 U.S.C. § 441i(b) or failed to properly report disbursements in  
16 violation of 2 U.S.C. § 434(b)(4). Finally, we recommend that the Commission find no reason to  
17 believe that John D. Dingell for Congress Committee and Guy R. Martin, in his official capacity  
18 as treasurer, or Representative John D. Dingell violated the Act or the Commission’s regulations  
19 in connection with the mailer in MUR 5600, and close the file as to these respondents.

<sup>7</sup> The term “communication” in 2 U.S.C. § 441d(a) includes “public communication” as defined in 11 C.F.R. § 100.26. 11 C.F.R. § 110.11(a); Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds; Final Rule, 67 Fed. Reg. 76,962, 76,964 (Dec. 13, 2002). A “mass mailing” is a type of public communication and is defined as “a mailing by United States mail . . . of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.” 2 U.S.C. § 431(23); *see* 11 C.F.R. §§ 100.26, 100.27. “[T]he statutory term ‘mailing’ used in 2 U.S.C. 441d(a) should not be given a separate meaning from ‘mass mailing.’” Disclaimers, 67 Fed. Reg. 76,962, 76,964.

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1 **IV. DISCUSSION OF CONCILIATION**

11 **V. RECOMMENDATIONS**

- 12 1. Find reason to believe that the Michigan Democratic State Central Committee and  
13 Alan Helmkamp, in his official capacity as treasurer, failed to place a disclaimer  
14 in a printed box set apart from the other contents of a communication, in violation  
15 of 2 U.S.C. § 441d(c)(2).  
16
- 17 2. Find no reason to believe that the Michigan Democratic State Central Committee  
18 and Alan Helmkamp, in his official capacity as treasurer, made improper  
19 expenditures for a public communication using non-Federal funds in violation of  
20 2 U.S.C. § 441i(b).  
21
- 22 3. Find no reason to believe that the Michigan Democratic State Central Committee  
23 and Alan Helmkamp, in his official capacity as treasurer, failed to properly report  
24 disbursements in violation of 2 U.S.C. § 434(b)(4).  
25
- 26 4. Find no reason to believe that the John D. Dingell for Congress Committee and  
27 Guy R. Martin, in his official capacity as treasurer, or Representative John D.  
28 Dingell violated the Act or the Commission's regulations in connection with the  
29 mailer in MUR 5600.  
30
- 31 5.

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- 6.
- 7. Approve the attached Factual and Legal Analysis.
- 8. Approve the appropriate letters.
- 9. Close the file as to the John D. Dingell for Congress Committee and Guy R. Martin, in his official capacity as treasurer, and Representative John D. Dingell.

Lawrence H. Norton  
General Counsel

3/21/06  
Date

BY: Rhonda J. Vosdingh by UC  
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Attachments:

- 1.
- 2. Factual and Legal Analysis

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